Hepting et al v. AT&T Corp. et al Doc. 335

Pillsbury
Winthrop
Shaw
Pittman LLP

50 Fremont Street
San Francisco, CA 94105
Tel 415.983.1000
Fax 415.983.1200

MAILING ADDRESS
P. O. Box 7880
San Francisco, CA 94120
www.pillsburylaw.com

August 11, 2006

Bruce A. Ericson
Phone: 415.983.1000
bruce.ericson@pillsburylaw.com

Via ECF

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Hepting, et al. v. AT&T Corp., et al.,* Case No. C-06-672 VRW

Dear Chief Judge Walker:

This letter is in response to the August 10, 2006 letter counsel for plaintiffs filed in the above-referenced action (Dkt. 333), which requests that the Court reconsider its oral ruling at the August 8th hearing staying all proceedings in this matter.

AT&T opposes plaintiffs' request for reconsideration and respectfully submits that the reasons to impose a stay in this case have become even more pronounced in light of the recent decision by the Judicial Panel on Multidistrict Litigation ("JPML") to transfer the NSA Surveillance Cases to this Court. Plaintiffs' request not only does not follow the local rules governing motions for reconsideration,[1] but it also runs counter to the purpose of the MDL process: holding efficient, coordinated proceedings in similar cases.

Contrary to plaintiffs' suggestion, the Court's decision to stay this case was not based solely on the impending ruling by the JPML. This Court noted at the hearing: "In the event that this Court is determined to be the transferee forum, then we'll have other cases to analyze . . . . And then, obviously, we have the issue of whether or not we should wait until the Ninth Circuit has decided the interlocutory appeal, if it accepts interlocutory

[1] Civil Local Rule 7-9(a) provides that "[n]o party may notice a motion for reconsideration without first obtaining leave of Court to file the motion." Plaintiffs have not sought leave of this Court to file such a motion, and indeed have filed no motion at all, only a two-paragraph letter request.

Dockets.Justia.com

appeal." Aug. 8, 2006 Hrg. Tr. ("H.T.") 70:11-16 (Walker, J.).[2] Indeed the relief sought by AT&T in its Motion for a Stay of Proceedings Pending Appeal ("Stay Motion," Dkt. 324) was precisely that: a stay pending appeal. At the hearing on August 8th, the Court ruled that it would grant AT&T's motion, at least in part, and impose a stay of all proceedings until a "date certain" in "late September or October." H.T. 70:5. Had the stay been ordered simply to allow the JPML to rule, only a stay of much shorter duration would have been necessary, as all counsel and the Court anticipated an order from the JPML within one to two weeks from the date of the hearing. *See* H.T. 7:1-3, 21-24. The Court also suggested that once its initial stay expired, it would consider a further stay of proceedings, presumably depending on the outcome of AT&T's and the government's petitions pursuant to 28 U.S.C. § 1292(b) to appeal this Court's Order of July 20, 2006 ("Order," Dkt. 308). H.T. 69:25-70:3 ("So I think prudence requires a stay of some limited duration. And then, of course, the Court can review the possibility of a further stay.").

Now that this Court has been assigned the MDL, the proceedings in the Ninth Circuit will affect all of the actions consolidated before the Court. It therefore makes even less sense than it did before to continue litigating this case when a decision by the Ninth Circuit could have a significant impact, possibly including dismissal, not only on this action but also on the approximately three dozen others that are in the process of being transferred to this Court.[3]

Plaintiffs' request also ignores the purpose of the MDL process, as well as the transfer order of the JPML. Both provide that all of the pending cases are transferred to this

---

[2] I am informed that the Court's reporter is completing the official transcript of the hearing. Citations herein are to a draft, "ascii text" version thereof.

[3] Plaintiffs notably support appellate review of the threshold state secrets question posed in the government's Section 1292 petition, and have cross-petitioned the Ninth Circuit to review this Court's decision that the state secrets privilege bars discovery regarding AT&T customer calling records – seeking review of both questions on an expedited basis. *See Hepting, et al. v. AT&T Corp., et al.*, Nos. 06-80109, 06-80110, Cross-Petition of Plaintiffs-Respondents to Certify Cross-Appeal Pursuant to 28 U.S.C. § 1292(b) and Response to the Petitions to Certify by the United States and by AT&T (9th Cir., filed August 9, 2006, attached hereto as Exhibit A). Given Plaintiffs' desire to obtain appellate resolution of these issues now, their request that discovery simultaneously proceed in this Court makes little sense.

Court "for coordinated or consolidated pretrial proceedings." Transfer Order at 3; *see also* 28 U.S.C. § 1407; *In re Linerboard Antitrust Litigation*, No. MDL No. 1261, Civ.A.98-5055, Civ.A.99-1341, 2004 WL 966236, at *2 (E.D. Pa. May 4, 2004) ("The district court's ultimate goal in multidistrict litigation is to '. . . promote the just and efficient conduct of such actions.'") (quoting 28 U.S.C. § 1407(a)). This purpose would be frustrated if the Court were to allow one case to proceed before all other actions have been transferred pursuant to the JPML's order. The transfer process is now underway, but the initial transfer order included only 17 of the more than 30 actions that have now been tagged for consolidation. Issuance of further conditional transfer orders from the JPML is expected soon, but completion of the transfer process will take time to complete.

In sum, the order of the JPML has increased, not diminished, the need for the stay of all proceedings ordered by this Court on August 8. Plaintiffs' letter request that the Court reconsider and vacate that stay should accordingly be denied.

Respectfully yours,

/s/

Bruce A. Ericson

cc: All counsel of record (via ECF)